

Equal Employment and Business Opportunity

Proposed Readoption: N.J.A.C. 19:53

Authority: N.J.S.A. 5:12-63, 69, 134 and 135.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Submit written comments by July 6, 2007 to:

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Tennessee and Boardwalk

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The agency proposal follows:

Summary

N.J.A.C. 19:53, Casino Control Commission (Commission) rules concerning the provision of equal employment and business opportunity, is scheduled to expire on May 24, 2007 pursuant to N.J.S.A. 52:14B-5.1. By filing this notice of proposed readoption prior to May 24, 2007, the chapter expiration date has been extended for 180 days to November 24, 2007. See N.J.S.A. 52:14B-5.1c.

This notice of proposed readoption is not required to be referenced in a rulemaking calendar since a public comment period of 60 days is being provided. See N.J.A.C. 1:30-3.3(a)5.

The rules on equal employment opportunity (EEO), in this chapter implement sections 134 and 135 of the Casino Control Act (the Act), N.J.S.A. 5:12-1 et seq. Section 134 of the Act requires that casino licensees and applicants, casino service industry licensees, and construction firms doing business with casino licensees, agree to afford equal employment opportunity to all employees and prospective employees in accordance with an affirmative action program approved by the Commission. Section 135 of the Act grants the Commission specific powers to enforce this statutory mandate. The EEO rules were initially adopted in 1978, as Subchapter 1, General Provisions. See 9 N.J.R. 603(c), 10 N.J.R. 83(a). Subchapter 2, Set-Aside Goals for Casino

Business with Minority and Women's Business Enterprises, came into being in early 1989, to implement Sections 184 through 190 of the Act. See 20 N.J.R. 2446(a), 21 N.J.R. 781(b).

After conducting a comprehensive review of the chapter in 1992 and 1993, the Commission repealed Chapter 53, Equal Employment Opportunity, and Chapter 53, Equal Employment and Business Opportunity, was adopted as new rules in August 1993.

See 25 N.J.R. 1675(a) and 3843(b). A readoption of the chapter followed in December 1995. See 27 N.J.R. 3924(b), 28 N.J.R. 284(a).

The Commission was not able to readopt Chapter 53 during the year 2000 as a result of several Federal court decisions and ongoing cases in which the constitutionality and validity of various affirmative action requirements imposed by the Act and the Commission's rules had been, or were being, challenged. Accordingly, the Commission sought and received a one year extension of the December 15, 2000 expiration date from Governor Whitman. A summary of the Federal court decisions follows.

Turning first to the contracting provisions contained in sections 184 through 190 of the Act, the court found in *Association for Fairness in Business v. Casino Control Comm*, 82 F. Supp. 2d. 353 (D.N.J. 2000), that these provisions violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. On December 5, 2000, the court entered a permanent injunction prohibiting the enforcement of sections 184 through 190 of the Act and all implementing rules.

The Commission continues to believe that a program to aid small and disadvantaged businesses has an important place within the casino regulatory system. Such a program is indeed central to the fulfillment of the legislative purpose of extending the economic benefits of casino gaming to all segments of the community. N.J.S.A. 5:12-1(b). However, it is clear from the *Association for Fairness in Business* case that the present statutory system is invalid and that a new system, which avoids unconstitutional racial and gender preferences, can be enacted only by the Legislature.

No court has addressed the constitutionality of sections 134 and 135 of the Act. However, in *Schurr v. Resorts International Hotel, Inc. and Casino Control Commission*, 16 *F. Supp. 2d* 537 (D.N.J. 1998), rev'd in part 196 *F.3d* 486 (3 Cir. 1999), the constitutionality of the implementing provisions of Chapter 53 of the Commission's rules was successfully challenged. The *Schurr* case was brought by a white male alleging that he was denied a job at the Resorts Casino Hotel because of his race. The Resorts employee who made the hiring decision stated that he chose an equally qualified minority applicant over plaintiff, believing he was required to do so because minorities were underrepresented in the relevant job category according to the percentage guidelines set forth in the rules and in Resorts' affirmative action plan.

Plaintiff sought declaratory and injunctive relief from the Commission, alleging that its rules denied him equal protection of the law in violation of the Fourteenth Amendment. Plaintiff sought monetary damages from Resorts, alleging that its affirmative action plan, adopted pursuant to the rules, is invalid under Title VII of the Civil Rights Act of 1965 and the New Jersey Law Against Discrimination.

The United States District Court granted summary judgment to the Commission, finding that plaintiff lacked standing to sue because the Commission's rules were not intended to and could not reasonably be interpreted to require a casino licensee to make a hiring decision on the basis of race or gender. The Court also granted summary judgment to Resorts, finding that its plan was valid under Title VII.

The Court of Appeals disagreed with the District Court's basis for finding that plaintiff lacked standing to sue the Commission, and found that "the regulations were intended to influence employment decisions generally and may, as here, affect concrete decisions; for example, which of two equally qualified job candidates will be hired." 196 *F.3d* at 493. However, the Court affirmed the grant of summary judgment to the Commission, finding, on an alternative theory, that plaintiff lacked standing to sue the Commission due to his failure to assert potential future injury.

As to Resorts, the Court of Appeals reversed the District Court, finding that its plan was invalid under Title VII, essentially because it was not predicated on any finding of historical or current discrimination.

The Court of Appeals made no finding as to plaintiff's constitutional claims, and issued no declaratory or injunctive relief against the Commission, because it ultimately affirmed the dismissal of the complaint against the Commission for lack of standing. However, the finding that the rules were intended to and may affect concrete employment decisions of casino licensees, combined with the absence of evidence of historical and continuing discrimination in the casino industry, at the very least raised serious questions regarding the constitutionality of certain provisions of the rules.

Immediately after the issuance of the Court of Appeals decision in the *Schurr* case, the Commission, through its General Counsel, advised all casino licensees and applicants as follows:

the Commission does not now and will not hereafter interpret its regulations to require any casino licensee or applicant to make any hiring, firing, promotional or other employment decision on the basis of race or gender. Insofar as the Commission is concerned, any such decisions are within the discretion of the casino licensee or applicant and should be made on the basis of merit.

The Commission also ceased enforcing the numerical guidelines in the rules, as well as the requirements regarding reporting of the gender and racial work force composition.

In October 2001, the Governor and Attorney General of the State of New Jersey, as well as the Chairman of the Commission, agreed to a Consent Order in *Rudolph v. Adamar of New Jersey, Inc.*, Civil Action No. 00-CV-190 (SMO) (Order Entered October 11, 2001) in which the State and Commission conceded the unconstitutionality under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, of N.J.A.C. 19:53-4.3 through 4.6, 6.4(b), 6.8, 6.12 and any other regulatory provision in

N.J.A.C. 19:53 to the extent it relates to the implementation of these sections. This Order permanently enjoined the enforcement of these provisions and directed the Commission to formally repeal the rules. All claims made against the validity of sections 134 and 135 of the Act were dismissed without prejudice pursuant to the terms of the Order.

The Commission, acting in compliance with the Consent Order, readopted Chapter 53 in 2002, minus those provisions that were declared invalid by the courts or were legally and substantively indistinguishable from such provisions. See 34 N.J.R. 381(a) and 2145(a).

The rules in Chapter 53 affirm the public policy of the State of New Jersey to promote equal employment and business opportunity by prohibiting discrimination. The Equal Employment and Business Opportunity Plan remains the primary regulatory vehicle used to monitor the equal opportunity efforts of casino licensees and applicants. The failure to readopt these rules would impede the employment and business benefits that they have provided for area residents, ancillary casino industries and the region. Readoption of the rules assures continuation of employment and business opportunities for all persons protected by the provisions of N.J.S.A. 5:12-134 and the Law Against Discrimination. Further, failure to readopt would violate the Commission's statutory mandate to promote equal employment opportunity within the casino industry.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:53.